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No. [redacted] 282

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

THE UNITED STATES, *Appellant*,

vs.

WYCKOFF PIPE & CREOSOTING COMPANY, INC.

APPEAL FROM THE COURT OF CLAIMS.

REPLY TO MOTION TO REMAND TO THE COURT OF CLAIMS.

HARVEY D. JACOB,
Counsel for Appellee.

March 21, 1925.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 911

THE UNITED STATES, *Appellant*,

vs.

WYCKOFF PIPE & CREOSOTING COMPANY, INC.

APPEAL FROM THE COURT OF CLAIMS.

REPLY TO MOTION TO REMAND TO THE COURT OF CLAIMS.

This case grows out of a contract dated December 10, 1917. Appellee faithfully performed its part of the contract and since performance has endeavored to secure its just compensation. At no time has there been a denial by appellant of its legal liability. The only question seems to be the measure of damages recoverable.

Counsel for appellant throughout the controversy have been either unwilling or unable to comprehend the theory upon which the action is based. By its in-

ability and refusal to permit appellee to perform the work in accordance with the terms of the original agreement, appellant breached the contract. This has at all times been admitted by counsel for appellant. Upon breach by appellant, there were two courses open to appellee,--to immediately consider the contract as broken and to sue for its damage, or, to negotiate a new contract with appellant at a price commensurate with the performance of the work at the time appellee was to perform. Appellee elected the latter course. The Court of Claims so finds when it states as a fact that appellee gave notice to appellant of a higher quotation for performing the work at the time it was performed.

It so happened that when appellant finally desired the work to be performed it also needed additional work of the same character as that called for by the original contract which it had by its delay breached. When this additional work was found necessary appellant requested appellee to bid thereon. Appellee submitted its proposal, in which it detailed every item, and the reasonable cost thereof, which entered into the performance of the work at that date, and gave notice to appellant that the prices quoted for the additional work would be the prices for the work originally contemplated under the broken contract. The Court of Claims specifically finds these facts. Appellant did not immediately accept the bid of appellee. Instead it investigated, analyzed and seriously considered every item of cost, and finally appointed a naval board to determine whether the proposal of appellee was a fair and reasonable price for the performance of the work at the time it was desired. After full investigation this board determined that the proposal as submitted

by appellee was fair and reasonable in all of its items for the work contemplated. Subsequent to this finding, appellee was instructed to proceed with the performance of the work originally contemplated as well as the additional work.

From these facts the Court will have no difficulty in concluding that upon the breach of the original contract appellee sought a new contract by submitting its proposition to appellant, which appellant by its direction to appellee to proceed with performance, accepted. And it is equally true that in this situation it is wholly immaterial whether or not, at the time the new offer was made and accepted, or at the time the work was performed, appellee did or did not have on hand certain material. The price at which appellee might have secured the material, assuming that it did have it on hand, is also irrelevant.

Appellee does not base its case upon any fanciful theory of speculative damage to it. It has asked in its petition only the reasonable value of the work at the time it was performed, and in arriving at this reasonable value it accepts as correct and takes as its test not what it might think is reasonable but only what appellant itself has determined to be fair and reasonable after full investigation by its own governmental boards, which analyzed, item by item, the cost of performing the work at the time it was performed; and upon the basis of this cost, determined by itself, instructed appellee to proceed. The Court of Claims has so found, and the finding of the Court is set out in appellant's present motion under its Paragraph 6 on page 4, wherein it quotes:

> "The reasonable value of the flooring provided for in the original contract, at the times it was

permitted to be laid, based on prices *determined by governmental authority* at about these times to be reasonable prices for the laying of additional flooring of the same kind, was $9,936.54 in excess of the amount plaintiff was paid therefor." (Italics mine.)

This sum of $9,936.54 is all appellee has ever asked of appellant and it is this sum and this sum only for which the Court of Claims gave judgment.

This case has been fully considered by the Court of Claims upon the evidence, both upon the original trial and upon the carefully prepared motion for a new trial which is set out as Exhibit A to appellant's present motion. The facts as found by the Court of Claims are clear and explicit, so much so that this Honorable Court will not have the slightest difficulty, in counsel's humble judgment, of disposing upon final hearing of the issue involved, if in fact there is any real or substantial issue in the case.

In order that the Court might have the complete record before it counsel attaches as Exhibit A appellee's reply to appellant's motion for a new trial, and as Exhibit B, appellee's objections to appellant's motion to incorporate into the record appellant's motion for a new trial, both of these motions being attached as Exhibit's A and B to appellant's present motion.

The present motion should be denied.

Respectfully submitted,

HARVEY D. JACOB,
Counsel for Appellee.

March 21, 1925.

EXHIBIT A.

IN THE UNITED STATES COURT OF CLAIMS.

No. C-19.

WYCKOFF PIPE & CREOSOTING COMPANY, INC.
Plaintiff
vs.
THE UNITED STATES
Defendant

PLAINTIFF'S REPLY TO DEFENDANT'S MOTION FOR A NEW TRIAL—PLAINTIFF'S MOTION FOR AMENDED FINDINGS OF FACT.

The argument of defendant in its motion for a new trial, aside from being mere repetition of the contentions advanced in its brief and in its oral argument before the Court, entirely overlooks the principle of law upon which plaintiff's right to recover is predicated. The identical argument of defendant has been considered by the Court and has been decided adversely. There is no new evidence referred to nor is there any other ground for a new trial called to the Court's attention. Defendant seeks merely a reargument of the same questions raised by it in the previous hearing.

A restatement of the theory upon which this case is founded should result in a denial of defendant's motion, and, likewise, in the Court amending its findings by the complete omission of findings IX and X, for which plaintiff now prays.

It is unnecessary to repeat the facts of the controversy. Suffice it is to say that by the Government's refusal to permit plaintiff to proceed with the contract work until from one to two years after it should have been performed, the Government breached the obligation of the contract. Upon this breach of the contract plaintiff had the right to consider the contract as broken and thereupon sue for its actual damage, or to seek a new contract for the performance of the work. Plaintiff did not elect to sue for its damage until it had attempted to negotiate a new contract for the identical work, *but at a price commensurate with its belated performance.*

After the breach and before any of the work was performed, plaintiff gave notice to the Government that it could not and would not proceed upon the price specified in the contract. In giving a quotation for additional work, as found by the Court in Finding No. VI, plaintiff insisted that "this quotation covers what we have previously offered and are under contract to furnish at the rate of $2.26 per square yard in accordance with our proposal of November 12, 1917." Inasmuch as the contract referred to had been broken by the Government, this suggestion of plaintiff was tantamount to an offer to defendant to do the work specified in the broken contract at a price in keeping with the cost of doing the work at the time defendant desired it to be done. Defendant then had the option of accepting the new offer of plaintiff or of rejecting the same and having the work done in such manner as it might deem to its best interest. Defendant did not immediately accept plaintiff's offer but appointed boards to investigate the set-up of plain-

tiff's figures to see whether or not its price was reasonable. After being fully informed of the facts, defendant instructed plaintiff to proceed with the performance of the work, thereby accepting the *new offer of plaintiff* to do the identical work but at the new price named therein.

These facts constitute an entirely new and independent contract, and it is upon this new contract that plaintiff seeks to recover the price of the work as mutually agreed upon.

The least that can be said is that these facts raise an implied promise to pay the reasonable value of the service performed, and *this reasonable value has been settled and agreed upon by defendant.*

The facts above set out are amply proven by the record and are found by the Court in its findings. Upon these facts, it is wholly immaterial and irrelevant whether or not, at the time the new offer was made and accepted or at the time the work was performed, plaintiff did or did not have on hand certain material. The price at which plaintiff might have secured the material, assuming that it did have it on hand, concerning which the record is not clear, is also irrelevant. Plaintiff's sole obligation was to do a definite piece of work at a price agreed upon and defendant's sole obligation was to pay this price, which, after full investigation, it deemed to be reasonable and contracted to pay. Plaintiff performed the work promptly and efficiently and all that now remains of the new contract is for defendant to pay the price agreed upon, which defendant for more than four years has neglected to do.

It is insisted that when the case is considered in its true light it becomes wholly immaterial whether or not

any extra expense was incurred by plaintiff by reason of the lengthy delay, caused by the Government, in the performance of the work, or whether at the time the new contract was made to perform the work at prices mutually acceptable certain of the material necessary to perform the work was in possession of the plaintiff or had to be purchased in the open market.

It is, therefore, respectfully insisted that the Court should amend the Findings of Fact only by striking out entirely Findings Nos. IX and X upon the ground that the same are wholly immaterial to a decision of the real question involved in the controversy.

Respectfully submitted,

HARVEY D. JACOB,
Attorney for Plaintiff.

IN THE

COURT OF CLAIMS OF THE UNITED STATES

No. C. 19

WYCKOFF PIPE & CREOSOTING COMPANY, INC., *Plaintiff*,
vs.
THE UNITED STATES, *Defendant*.

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S MOTION TO INCORPORATE INTO THE RECORD DEFENDANT'S MOTION FOR A NEW TRIAL.

Defendant's present motion is most unusual.

Paragraph 3 of Supreme Court Rule 8 provides that the record shall contain

> "in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings *which are necessary* to the hearing in this Court."

Defendant's motion represents that the "questions of fact" contained in its overruled motion for a new trial are "material and necessary" to properly present the issue, and should, therefore, be made a part of the record.

As has previously appeared to the Court, defendant's motion for a new trial contained nothing more substantial than a restatement of its trial brief and a reargument of the questions therein advanced. As

was the trial brief, it was presumably based upon the *facts contained in the record,* and how such motion for a new trial can add to and take away from the facts of a closed record is not understood.

To grant the present motion would be in effect to grant a new trial, which the Court has refused to do, and to incorporate into the findings of facts as facts the fanciful theories of the signers of the motion,—Messrs. Lovett and Hays,—witnesses plaintiff has had no opportunity of cross-examining.

The argument of counsel on the motion for a new trial is no more *necessary* to the hearing in the Supreme Court than are the original arguments in the trial briefs. These, of course, at the proper time might assist the Court, but for the present, previous arguments are important only to counsel and that because we sometimes are pleased with our handiwork and sometimes we are either too busy, et cetera, to rewrite and revise our previous good efforts. The record necessary to a "hearing" of the case in the Supreme Court was made and closed months ago. The Supreme Court does not desire the record to contain the "hearing" itself. In due season, counsel for each party will have an opportunity of *testifying* or arguing from the record of *proven facts* to as full an extent as the Supreme Court will tolerate.

The present motion should be denied.

Respectfully submitted,

HARVEY D. JACOB,
Attorney for Plaintiff.